

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAKE THOMAS GIPSON

No. C 06-5445 WDB

Plaintiff,

ORDER

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

INTRODUCTION

Plaintiff Jake Thomas Gipson moves for summary judgment, seeking judicial review of a final decision by the Commissioner of Social Security finding that he was not disabled and denying him Supplemental Security Income ("SSI") benefits. Defendant, the Commissioner of Social Security, opposes Plaintiff's motion and has filed a cross-motion for summary judgment, asking the Court to affirm the Commissioner's final decision. The matter was deemed submitted for decision by this court without oral argument, pursuant to Civil Local Rule 16-5. After careful review and consideration of the record and the papers submitted, the court hereby GRANTS defendant's cross-motion for summary judgment, DENIES Plaintiff's request for relief, and AFFIRMS the Commissioner's decision.

1 1094, 1097-98 (9th Cir. 1999) (citations omitted). "Substantial evidence" means more than
 2 a scintilla but need not be a preponderance; it is such evidence that a reasonable mind could
 3 accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389 (1971);
 4 *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). "If the evidence can support either
 5 outcome, the court may not substitute its judgment for that of the ALJ." *Tackett*, 180 F.3d at
 6 1098, quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992).

7 DISCUSSION

8 A. APPLICABLE LAW - STEPS TO DETERMINING DISABILITY

9 An SSI claimant is considered disabled if (1) he suffers from a "medically determinable
 10 physical or mental impairment which can be expected to result in death or which has lasted
 11 or can be expected to last for a continuous period of not less than twelve months," and (2) the
 12 "impairment or impairments are of such severity that he is not only unable to do his previous
 13 work but cannot, considering his age, education, and work experience, engage in any other
 14 kind of substantial gainful work which exists in the national economy." 42 U.S.C. §
 15 1382c(a)(3)(A), (B).

16 The Social Security Regulations set out a five-step sequential process for determining
 17 whether a claimant is disabled within the meaning of the Social Security Act. 20 C.F.R. §
 18 404.1520. The five steps are:

19 **Step 1.** Is the claimant presently working in a substantially gainful activity? If
 20 so, then the claimant is "not disabled" within the meaning of the Social Security
 21 Act and is not entitled to disability insurance benefits. If the claimant is not
 22 working in a substantially gainful activity, then the claimant's case cannot be
 23 resolved at step one and the evaluation proceeds to step two. See 20 C.F.R. §
 24 404.1520(b).

25 **Step 2.** Is the claimant's impairment severe? If not, then the claimant is "not
 26 disabled" and is not entitled to disability insurance benefits. If the claimant's
 27 impairment is severe, then the claimant's case cannot be resolved at step two
 28 and the evaluation proceeds to step three. See 20 C.F.R. § 404.1520(c).

Step 3. Does the impairment "meet or equal" one of a list of specific
 impairments described in the regulations? If so, the claimant is "disabled" and
 therefore entitled to disability insurance benefits. If the claimant's impairment
 neither meets nor equals one of the impairments listed in the regulations, then
 the claimant's case cannot be resolved at step three and the evaluation proceeds
 to step four. See 20 C.F.R. § 404.1520(d).

1 **Step 4.** Is the claimant able to do any work that he or she has done in the past?
 2 If so, then the claimant is "not disabled" and is not entitled to disability
 3 insurance benefits. If the claimant cannot do any work he or she did in the past,
 then the claimant's case cannot be resolved at step four and the evaluation
 proceeds to the fifth and final step. See 20 C.F.R. § 404.1520(e).

4 **Step 5.** Is the claimant able to do any other work? If not, then the claimant is
 5 "disabled" and therefore entitled to disability insurance benefits. See 20 C.F.R.
 § 404.1520(f)(1). If the claimant is able to do other work, then the
 6 Commissioner must establish that there are a significant number of jobs in the
 national economy that claimant can do. There are two ways for the
 7 Commissioner to meet the burden of showing that there is other work in
 "significant numbers" in the national economy that claimant can do: (1) by the
 8 testimony of a vocational expert, or (2) by reference to the Medical-Vocational
 Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2. If the Commissioner meets
 9 this burden, the claimant is "not disabled" and therefore not entitled to disability
 insurance benefits. See 20 C.F.R. §§ 404.1520(f), 404.1562. If the
 10 Commissioner cannot meet this burden, then the claimant is "disabled" and
 therefore entitled to disability benefits.

11 *Tackett*, 180 F.3d at 1098-99. The burden of proof is on the claimant as to steps one to four.

12 *Id.* at 1098. At step five, the burden shifts to the Commissioner. *Id.*

13 B. THE ALJ'S DECISION -- APPLICATION OF THE FIVE-STEP PROCESS

14 Applying the five-step evaluative process, the AJL first found that Plaintiff had not
 15 ever performed substantial gainful activity.

16 Next, the Judge found that Plaintiff had a "severe hearing loss in his left ear." (Tr. at
 17 25).

18 Under step three, the ALJ found that Plaintiff's symptoms did not approach in severity
 19 the criteria listed in 20 CFR Part 404, Subpart P, Appendix 1, because "there is no evidence
 20 that [Plaintiff] has any significant impairment involving his better ear (right ear), as required
 21 for a finding of disability under Listing Section 2.08." (Tr. at 21). Given that determination,
 22 the ALJ was required to proceed to step four, where he determined Plaintiff's "residual
 23 functional capacity," or "RFC."

24 In step four, the ALJ concluded that Plaintiff had no past relevant work, for purposes
 25 of assessing whether Plaintiff is capable of returning to past relevant work. (Tr. at 21). The
 26 ALJ also found that Plaintiff's RFC included simple, repetitive work at all exertional levels,
 27 with the need to avoid concentrated exposure to loud noise, and no more than occasional
 28 conversations with supervisors, co-workers, and the public, due to auditory processing

1 limitations. (Tr. at 23). The ALJ believed that Plaintiff had the ability to communicate with
2 others using normal tones in non-noisy environments — a skill Plaintiff demonstrated at the
3 hearing. (Tr. at 23-24).

4 Given his findings in the first four steps, the ALJ was required to proceed to step five,
5 where he assessed whether the Social Security Administration met its burden to show that
6 Plaintiff was able to do work available in significant numbers in the national economy
7 consistent with Plaintiff's medically determinable impairment, functional limitations, age,
8 education and work experience.

9 Crediting the testimony of the vocational expert — based upon hypotheticals posed
10 to the expert about Plaintiff's RFC — the ALJ found that Plaintiff was able to perform jobs
11 existing in significant numbers in the regional and national economy, including, for example,
12 numerous assembly jobs. The ALJ noted that "although the [Plaintiff] has significant
13 limitations due to his hearing loss, and he has limited work experience, these adversities do
14 not result in preclusion from all work, in light of [Plaintiff's] young age and ability to perform
15 work at all exertional levels." (Tr. at 22). Accordingly, because he found that Plaintiff was
16 still capable of working, the ALJ concluded that Plaintiff was not disabled within the meaning
17 of the Social Security Act and, thus, that Plaintiff should not receive SSI benefits.

18 Judge Mazzi explicitly noted in his Opinion that Plaintiff's RFC was based upon "all
19 of the evidence." (Tr. at 24). We describe the principal evidence relied upon by Judge Mazzi
20 in the paragraphs that follow.

21 Judge Mazzi noted that the record contained four reports from hearing specialists who
22 established that Plaintiff had a profound hearing loss in his left ear and normal hearing in his
23 right ear. These reports include an August 5, 1992, report from otolaryngologist, Larry
24 Schoenrock, M.D., who opined that Plaintiff had hearing within normal limits in the right ear,
25 but that Plaintiff had a profound sensorineural loss in the left ear. (Tr. at 143). Dr.
26 Schoenrock commented also that the hearing loss had remained stable since the last
27 audiogram in November, 1989, and he recommended that Plaintiff return for a follow-up visit
28 in three months. (Tr. at 143). The reports mentioned by Judge Mazzi also include a June 18,

1 2001, Audiology Evaluation by E. Gail Marcopulos, M.A., a clinical audiologist. Results
2 from this evaluation again indicated that Plaintiff had hearing "well within normal limits for
3 the right ear and a profound sensori-neural hearing loss for the left ear." (Tr. at 148). The
4 report mentioned, too, that a hearing aid was not recommended because the only fitting
5 appropriate would be the contralateral routing of signal ("CROS") fitting, which Plaintiff had
6 used in the past and had found unsatisfactory. *Id.*

7 Plaintiff was evaluated again on July 21, 2003, by Marina Mulvey, M.A., another
8 clinical audiologist. Plaintiff was referred to Ms. Mulvey by the Department of
9 Rehabilitation. The results were consistent with the prior audiology reports and revealed
10 "unchanged hearing thresholds, remaining stable in the normal range for the right ear and in
11 the profound range for the left ear." (Tr. at 164). Ms. Mulvey recommended an amplification
12 system to Plaintiff and suggested that Plaintiff return to the clinic for re-evaluation in one year
13 or sooner, if necessary. *Id.* The fourth report, dated February 11, 2004, came from
14 otolaryngologist, Dr. Adnan J. Hadeed, M.D. Dr. Hadeed did a head and neck evaluation of
15 Plaintiff and reviewed Plaintiff's records. Dr. Hadeed's assessment, based on this exam and
16 his review, was that Plaintiff had normal hearing on his right side and profound deafness on
17 his left side. Dr. Hadeed also opined that Plaintiff had no speech impairment, and that he did
18 not require a hearing aid. (Tr. at 165).

19 After reviewing the reports from the hearing specialists, the ALJ noted that the record
20 also contained reports from other specialists that reflect that Plaintiff has difficulty with
21 auditory processing, due to his hearing impairment. These reports include a January 9, 1997,
22 Psychological-Educational Assessment Report from Dennis Watanabe, School Psychologist
23 for Santa Rosa City Schools. (Tr. at 144). Mr. Watanabe conducted cognitive, achievement,
24 and perceptual testing after Plaintiff was referred for a three-year reevaluation of his special
25 education placement and services. *Id.* In a comprehensive report, Mr. Watanabe noted that
26 Plaintiff's limited hearing did not seem to be a factor in his overall assessment performance
27 and that, in class, his hearing seemed not to be a problem. (Tr. at 145). Nonetheless, Mr.
28 Watanabe opined that Plaintiff's performance on the test of auditory attention, memory, and

1 reasoning fell below average, and that Plaintiff's "auditory processing and development should
2 continue to be a major concern in [Plaintiff's] education progress." (Tr. at 146). In the
3 summary of his report, Mr. Watanabe stated that Plaintiff's academic progress in reading and
4 writing was satisfactory, but that he was extremely delayed in math. Mr. Watanabe concluded
5 that Plaintiff continued to meet eligibility requirements for special education services.

6 The next report indicating that Plaintiff had a deficiency with auditory processing was
7 an Auditory Processing Evaluation Report by speech-language pathologist, Debra Ross-
8 Swain, Ed.D, dated August 3, 2004. Plaintiff was referred to Ms. Swain by Dan McCaskell,
9 Plaintiff's vocational rehabilitation representative who accompanied Plaintiff to his hearing
10 before Judge Mazzi. Ms. Ross-Swain administered a battery of tests and concluded that
11 Plaintiff "experiences moderate to significant difficulty with specific skills of auditory
12 processing." (Tr. at 175). In her recommendations about issues that may help Plaintiff in a
13 vocational setting, Ms. Ross-Swain opined (1) that it would be necessary for a supervisor to
14 offer a repetition/clarification of instructions and verify understanding; (2) that working in an
15 environment with excessive ambient or competing noise would exacerbate Plaintiff's auditory
16 processing deficiencies; (3) that office placement in a quiet environment would be preferred;
17 (4) that warehouses or other incompetent acoustic environments would be unfavorable; (5)
18 that Plaintiff's difficulty with auditory processing information should not be mistaken for
19 limited intellectual ability; and (6) that Plaintiff has the ability to engage in vocational training
20 and to perform successfully in a setting that is acoustically competent with limited distractions
21 and competing noise. (Tr. at 183).

22 The material of record also includes a July 2003, report by Vocational Evaluator,
23 Donna J. Luna, M.A., to whom Plaintiff was referred by the Department of Rehabilitation.
24 Plaintiff was referred to Ms. Luna for a 3-day assessment to answer questions about Plaintiff's
25 physical tolerance levels, general vocational aptitudes, vocational interests, worker behaviors,
26 and learning styles. (Tr. at 149). During the evaluation, Plaintiff expressed an interest in
27 computer graphics, auto mechanics, and data entry and warehouse work. *Id.* Ms. Luna's
28 recommendation for Plaintiff was that he consider a data entry course or an entry-level data

1 entry job, or a job that required physical tasks. (Tr. at 155). Ms. Luna's rationale for this
2 recommendation was based upon Plaintiff's score in the above average range on the data entry
3 work samples he completed during the evaluation. *Id.* In addition to the vocational
4 recommendation, Ms. Luna suggested that Plaintiff may need assistance in dressing for job
5 interviews and with general personal hygiene. *Id.*

6 The record also contains evidence given directly by Plaintiff through his testimony at
7 the hearing before Judge Mazzi. (Tr. at 236-257). At the outset of the hearing, Judge Mazzi
8 asked Plaintiff if he could hear him. Plaintiff responded "yes." Plaintiff also mentioned that
9 he did not wear a hearing aid because "he doesn't like hearing aids." (Tr. at 246).

10 Plaintiff testified that in the past he worked stocking shelves and retrieving carts at a
11 retail store for less than six months. Plaintiff stated that his supervisors had him doing
12 different things every day and, as a consequence, that he became confused and did not
13 understand what he was supposed to do. Plaintiff said that some days he remembered what
14 to do at his job, and that other days he did not remember.

15 Plaintiff testified that he also had a job at Blockbuster Video for almost a year,
16 checking in and restocking videos.¹ Plaintiff did not work at the front counter with customers.
17 Plaintiff testified that in this job, too, he would become confused trying to understand what
18 his supervisors were ordering him to do, sometimes because the supervisor would speak very
19 rapidly. Plaintiff also became confused when his job tasks changed or when the shelves for
20 the various genres of movies were relocated. Plaintiff stated that he sometimes would become
21 confused at Blockbuster even when his job remained the same from day to day. Plaintiff's job
22 at Blockbuster ended because it was term limited. Plaintiff was not asked to leave specifically
23 because of problems with his performance; though, as Plaintiff's representative pointed out,
24 several other employees who were working at the store through the same school training
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27
28 ¹ As the ALJ noted in his Opinion (see Tr. at 21), Plaintiff's employment at Blockbuster did not amount to "significant past employment" under Step Four of the ALJ's analysis because the employment was not performed at the "substantial gainful employment" level, 20 C.F.R. § 416.965(a).

1 program were retained. Plaintiff believes that he was not retained because of his hearing
2 problem.

3 In his senior year of high school, Plaintiff was transferred from special education
4 classes to regular classes. Plaintiff testified that he did well in History his senior year because
5 the class consisted of a lot of reading, and he could understand that, as opposed to a lot of
6 talking by the teacher. Plaintiff said that it is better for him to get instructions from written
7 material because it helps him gather the information. By contrast, in his senior English class,
8 Plaintiff often felt very behind, because he could not keep up with the teacher's oral
9 instructions. Plaintiff experienced the same problems in his driver's education class, where
10 the teacher spoke "way too fast and a little too low." (Tr. at 254). Plaintiff received an "F"
11 in driver's education. Plaintiff noted that in his special education class, prior to being
12 transferred to regular classes, he understood everything the teacher said because she spoke
13 loudly and clearly. (Tr. at 261).

14 With respect to Plaintiff's daily routine, Plaintiff stated that a normal day usually
15 consists of writing stories, reading books, visiting friends, and listening to the radio. Plaintiff
16 later added that the stories he writes are "fairly long" and that he does not have trouble
17 remembering the plot of the story from one sitting to the next "because [he] ha[s] it all in his
18 head....[i]t's stored up there." (Tr. at 255). Plaintiff stated that he did not use headphones
19 when he listened to the radio, and that he could hear the radio fine if he turned it up loud.
20 Plaintiff stated that he lives with his grandmother, and that he helps her around the house by
21 taking out the trash and sometimes cleaning up. Plaintiff testified that it is very difficult for
22 him to hear his grandmother and other people talking when there is ambient noise.²

23 Plaintiff's testimony at the hearing about his daily activities was consistent with
24 evidence he provided in two "Daily Activities Questionnaires." (Tr. at 84-89; 104-109). In
25 the questionnaires, Plaintiff wrote that he likes to read, write his own stories, play video
26

27 ² Plaintiff's representative, Dan McMaskell, clarified on the record that Plaintiff's grandmother
28 also may have a hearing problem, and that the problems communicating in their home may be due either
to Plaintiff's or his grandmother's hearing loss, or both. (Tr. at 249).

1 games, eat, and listen to music. Plaintiff also stated that he has tried to get a job but that he
2 has been refused because he cannot hear. (Tr. at 88).³ He mentioned, however, that while his
3 social activities have not really changed because of his condition, he has to listen more
4 carefully to people who are talking to him. (Tr. at 107). Plaintiff did not mention whether
5 he participated in any specific sports, but the record includes a July 2003 report from the
6 Sutter Medical Center of Santa Rosa, where Plaintiff was seen for a toe injury he sustained
7 to his right second and third toes three days before while he was jetskiing. (Tr. at 199).

8 Judge Mazzi also relied for his opinion upon the testimony of a vocational expert,
9 Robert Raschke. (Tr. at 255-260; 263-281). Mr. Raschke began by answering questions
10 about the proper classifications for Plaintiff's past work and stated that in Plaintiff's retail store
11 job, Plaintiff was doing work classified as light and unskilled. Mr. Raschke acknowledged
12 also that Plaintiff's employment at both the retail store and at Blockbuster was "sheltered
13 employment," where, through Plaintiff's school and with funding from the Department of
14 Rehabilitation, Plaintiff's employers were paid to give Plaintiff a job.

15 Mr. Raschke's testimony also consisted of answers to questions from the ALJ about the
16 various jobs that would be available to a hypothetical claimant with a particular RFC. In the
17 first hypothetical, the ALJ asked the vocational expert to consider a situation with an
18 individual who has a high school education with primarily special education classes, where
19 the only physical limitation is a profound hearing loss in the left ear (normal hearing in the
20 right ear), and where the person would have to avoid concentrated noise exposure but could
21 hear normal conversation in a quiet setting such as an office. (Tr. at 264). After hearing this
22 hypothetical, the vocational expert responded that a hypothetical claimant with the stated
23 limitations could perform the two jobs that Plaintiff had in the past. (Tr. at 264).

24
25 ³ Though Plaintiff and his grandmother believe that Plaintiff has been turned down for jobs
26 because of Plaintiff's hearing impairment, this may not be the only explanation for Plaintiff's difficulty
27 finding work. After meeting with Plaintiff, a vocational evaluator, Ms. Donna Luna, suggested in her
28 report that Plaintiff may need assistance in dressing for job interviews and with general personal
hygiene. Tr. at 155. It is possible, therefore, that with vocational training that included assistance with
interviewing skills and life skills, Plaintiff could dramatically increase his chances of being offered
employment.

1 The ALJ then posed a second hypothetical to the vocational expert in which the
2 claimant would have the same limitations as in the first hypothetical, but also would have
3 limitations in being able to understand and follow instructions to perform a job — instructions
4 would have to be repeated daily because of an auditory fatigue factor or some other factor —
5 and the hypothetical claimant would make two or three mistakes a day. (Tr. 264-265). After
6 hearing this modified set of assumptions, the vocational expert concluded that this "would
7 shrink the labor market but it certainly wouldn't eliminate a person from competing." (Tr.
8 at 265). The vocational expert clarified that this was assuming the claimant generally could
9 stay on task, and only would have to be reminded on occasion about what he needed to do.

10 The ALJ posed a third hypothetical, where he added that the claimant only could
11 perform "simple repetitive tasks," for unskilled work, with only *occasional* conversations with
12 supervisors, the public, and coworkers. (Tr. at 265). Using this set of assumptions, the
13 vocational expert advised that he believed such a claimant could not perform the two past jobs
14 that Plaintiff had performed (at the retail store and at Blockbuster), but that such a claimant
15 *could* perform other jobs that exist in significant numbers in the national economy. For
16 example, the vocational expert mentioned that such a claimant could do janitorial work that
17 was simple and repetitive, or could do various types of assembly work, such as filter
18 assembler. In short, the expert believed that such a claimant was qualified to perform "task
19 oriented" work as opposed to "people oriented" work. (Tr. at 267). The expert advised also
20 that if the ALJ added as an additional restriction that the hypothetical claimant avoid
21 concentrated noise exposure, there would be an erosion of about 40% of the jobs he
22 recommended, but that a claimant with all of the restrictions could still find work that existed
23 in significant numbers in the national economy.

24 Following the hypothetical questions from the ALJ, Mr. McCaskell, Plaintiff's
25 representative asked the vocational expert to consider an additional hypothetical — one that
26 factored in Plaintiff's low test scores in reasoning, math and language. To this, the vocational
27 expert responded that the jobs he mentioned in the assembly field would not require numerical
28 skills. (Tr. at 274). When questioned about how Plaintiff's poor auditory memory would

1 affect his ability to work, the expert advised that many simple one and two-step jobs are
2 taught by simple demonstration. (Tr. at 276). He gave as an example the many jobs
3 performed by people who do not speak English, who are taught their jobs not by oral
4 instructions, but by simple demonstration or by watching someone in the workplace over an
5 extended period of time. (Tr. at 276). Plaintiff's representative noted that Plaintiff's primary
6 difficulty is with oral instructions, and that "we stipulate that he could probably read and carry
7 out written instructions." (Tr. at 279).

8 The vocational expert ended his testimony by clarifying to the ALJ and to Plaintiff's
9 representative that in his responses about the hypothetical claimants, he was assuming that the
10 claimants did not *only* have a problem with hearing, but also had trouble processing
11 information that is heard. (Tr. at 280). The ALJ agreed that a limited ability to process
12 instructions was included in the hypothetical scenarios posed to the expert. (Tr. at 280).

13 Also in the record is evidence from Plaintiff's grandmother, Ellen Stover, about
14 Plaintiff's daily functioning. (Tr. at 90; 110). The Function Reports completed by Plaintiff's
15 grandmother stated that in his daily life Plaintiff takes care of his personal needs, reads, writes
16 stories, looks for work, visits friends, spends time on the computer, watches television, goes
17 shopping, and learns to cook. (Tr. at 90; 110). Ms. Stover wrote also that Plaintiff helps out
18 with some chores, but that because of his hearing loss, he may not hear everything the first
19 time, and she has to explain things step by step. (Tr. at 92). She mentioned, too, that Plaintiff
20 does not drive a car because of his hearing loss. He walks, takes public transportation and
21 gets rides from friends. (Tr. at 93). Ms. Stover also confirmed that Plaintiff has difficulty
22 concentrating, understanding, and following instructions, and that instructions may need to
23 be repeated before he gets it right, but that Plaintiff is "good" at following written instructions.
24 (Tr. at 95). Ms. Stover reported that Plaintiff gets along with authority figures, if they
25 understand that he has a hearing loss. (Tr. at 95). Finally, Ms. Stover commented that
26 Plaintiff has been looking for work since he graduated from high school but that she believes
27 his hearing loss is hurting his ability to find work. (Tr. at 97).

1 Also in the record are reports about Plaintiff's psychiatric and mental functioning. The
2 reports conclude that Plaintiff is not significantly limited in these areas. (Tr. at 185-190).
3 In addition, Dr. Pong, M.D., who reviewed Plaintiff's file, completed on March 1, 2004, a
4 physical RFC assessment, in which he concluded that Plaintiff has no exertional limits,
5 postural limits, manipulative limits, or visual limits. (Tr. at 166-173) Consistent with the
6 other medical evidence in the record, Dr. Pong noted that "Plaintiff should not work where
7 good hearing is required for both ears," but should be able to hear normal conversation
8 without difficulty. (Tr. at 170).

9
10 C. REVIEW OF THE ALJ'S DECISION

11 Plaintiff asks this court to reverse the ALJ's decision of non-disability because, in
12 Plaintiff's view, it is not based upon substantial evidence. Specifically, Plaintiff raises for
13 review several issues that are grounded in Plaintiff's fundamental assertion that the ALJ failed
14 properly to account for Plaintiff's severe impairment with auditory processing and focused
15 instead only on Plaintiff's severe hearing loss in his left ear. This error, Plaintiff argues,
16 resulted in an improper RFC and the erroneous conclusion that Plaintiff is capable of
17 performing jobs that exist in significant numbers in the national economy. Plaintiff also
18 raises for review the ALJ's failure to consider whether Plaintiff had a neurological disorder.
19 Finally, Plaintiff complains that the ALJ improperly discounted Plaintiff's report of his
20 symptoms.

21 1. *The ALJ's Findings and Conclusions About Plaintiff's Impairments and*
22 *RFC Were Supported By Substantial Evidence of Plaintiff's Difficulty*
With Auditory Processing.

23 Plaintiff seeks review of the ALJ's decision regarding Plaintiff's medically established
24 impairments, Plaintiff's RFC, and the conclusion that, given a particular RFC, Plaintiff is
25 capable of performing jobs that exist in significant numbers in the national economy.
26 Underlying Plaintiff's complaints about the ALJ's decision is Plaintiff's fundamental argument
27 that, in assessing Plaintiff's condition and arriving at an appropriate RFC, the ALJ considered
28

1 only Plaintiff's hearing loss and did not consider the substantial evidence that Plaintiff also
2 had a severe impairment with auditory processing. We disagree.

3 "Substantial evidence" means more than a scintilla but less than a preponderance; it is
4 such evidence that a reasonable mind might accept as adequate to support a conclusion.
5 *Richardson v. Perales*, 402 U.S. 389 (1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
6 1999). As illustrated above in the extensive discussion of the evidence, the ALJ made clear
7 in his opinion and throughout Plaintiff's administrative hearing that he considered, understood,
8 and agreed with the evidence that Plaintiff suffered from a significant limitation in auditory
9 processing and was not simply hearing impaired. The ALJ reviewed carefully in his opinion
10 all of the medical evidence supporting this conclusion, and the ALJ explicitly noted that his
11 conclusion was based upon all of this evidence. Indeed, the ALJ could not have been more
12 clear that he considered Plaintiff's impairment with auditory processing than when, in arriving
13 at Plaintiff's RFC, he concluded that:

14 Based on the record as a whole, I find that the claimant has the
15 residual functional capacity (RFC) for simple, repetitive work at all
16 exertional levels, with the need to avoid concentrated exposure to loud
noise, and no more than occasional conversations with supervisors,
co-workers and the public, **due to auditory processing limitations**.

17 (Tr. at 23) (emphasis added). The ALJ also stated in his opinion that "claimant's allegations
18 of confusion are reasonably interpreted to be the result of the auditory processing limitations
19 reflected in the medical record." (Tr. at 23).

20 Moreover, the ALJ included these exact RFC limitations — and the additional
21 limitation that Plaintiff would have difficulty understanding and following instructions to
22 perform a job⁴ — in the hypotheticals posed to the vocational expert that resulted in the

24 ⁴ See Tr. 264-65. In his opening brief, Plaintiff argues that the ALJ did not include in Plaintiff's
25 RFC the functional limitation that "it would be necessary for a supervisor to offer repetitive/clarification
26 of instructions and verify understanding." Plaintiff's Motion for Summary Judgement at 9:16-10:8.
27 Plaintiff's argument is without merit. The ALJ explicitly included this limitation in one of his
28 hypotheticals to the vocational expert: "Before we get to other jobs, let me add an additional limitation
and that would be a limited ability to understand and follow instructions required to perform the job,
that is instructions would have to be repeated perhaps even daily, the same instructions with no
significant change in the work setting because of an auditory fatigue factor or other reasons." Tr. at 264-
65.

1 expert's opinion that Plaintiff was capable of working. Indeed, it is difficult to understand
2 Plaintiff's argument that the AJL's decision failed to account for Plaintiff's auditory processing
3 limitations, given the exchange between the ALJ and the vocational expert at the end of the
4 hearing that clarified that the vocational expert had assumed in evaluating the hypotheticals
5 that the claimant *not only* had a problem with hearing, but also had trouble processing
6 information that is heard. (Tr. at 280).

7 Taking into account Plaintiff's auditory processing difficulties, including Plaintiff's
8 need to have instructions repeated, Plaintiff's need to avoid concentrated noise exposure, and
9 Plaintiff's need to have only occasional interactions with his supervisors, the vocational expert
10 identified several categories of jobs for which Plaintiff would be qualified in the assembly
11 field, among others. That Plaintiff is capable of working outside the home in such fields is
12 amply supported by *all* of the medical evidence, which is consistent throughout the record.

13 For example, the vocational evaluator, Ms. Luna, indicated that Plaintiff scored well
14 on a test for data entry skills and certainly was capable of performing a data entry job.
15 Similarly, the report from the speech-language pathologist, Ms. Ross-Swain, indicated that
16 Plaintiff's difficulty processing information should not be mistaken for limited intellectual
17 ability. Ms. Ross-Swain further added that Plaintiff "has the ability to engage in vocational
18 training and to perform successfully in a setting that is acoustically competent with limited
19 distractions and competing noise." (Tr. at 183).

20 The conclusions of the ALJ and the vocational expert also are supported by the
21 evidence in the record as reported by Plaintiff himself. Plaintiff noted that he spends a great
22 deal of time reading, and adequately understands written instructions; that he is capable of
23 remembering written materials, such as those he was required to recall for his senior level
24 history class, and for the long fictional stories he writes in his free time; and that he can
25 understand instructions after they are repeated in a step-by-step fashion. As the vocational
26 expert pointed out, in many assembly jobs, instructions are provided in the form of a
27 demonstration (as often may be necessary for non-English speaking employees), not solely
28 as oral instructions. There also is the likely possibility that written instructions could be

1 provided. Importantly, on the record at the hearing, Plaintiff's representative, Mr. McCaskell,
2 conceded that, "we stipulate that [Plaintiff] could probably read and carry out written
3 instructions." (Tr. at 279).

4 In sum, based upon all of the evidence in the record, there simply is nothing to show
5 that Plaintiff is not capable of working outside the home. Though Plaintiff is correct that the
6 ALJ listed Plaintiff's severe impairment as being for "severe hearing loss in his left ear," the
7 record could not be clearer that the ALJ understood that this severe impairment included a
8 significant limitation in auditory processing. Accordingly, we conclude that the ALJ's opinion
9 about Plaintiff's RFC and resulting ability to find work that exists in significant numbers in
10 the national economy (relying upon the opinion of the vocational expert) is supported by
11 substantial evidence and, on that basis, must be affirmed.

12 2. *The ALJ Did Not Commit Legal Error by Failing To Consider Whether Plaintiff*
13 *had a Neurological Disorder*

14 Plaintiff next asserts that the ALJ committed legal error by failing to consider whether
15 Plaintiff had a neurological impairment that rendered him disabled. Specifically, Plaintiff
16 argues that he may fit into the definition of having "organic brain damage," as that disorder
17 is defined in Listing 12.00(D)(8) of the relevant Social Security Regulations, and that the ALJ
18 erred in not evaluating the implications of that Listing. Plaintiff's argument is without merit.

19 As set forth above, "[s]ubstantial evidence" means more than a scintilla but less than
20 a preponderance; it is such evidence that a reasonable mind might accept as adequate to
21 support a conclusion. *Richardson v. Perales*, 402 U.S. 389 (1971); *Meanel v. Apfel*, 172 F.3d
22 1111, 1113 (9th Cir. 1999).

23 Plaintiff raises the possibility that he has organic brain damage for the first time in this
24 motion seeking review of the ALJ's decision. He never submitted any forms to the
25 Commission claiming that this was a basis upon which he was seeking benefits. Nor did
26 Plaintiff or any of the medical personnel who examined Plaintiff produce any supporting
27 evidence about such a disorder. As noted by the ALJ in discussing Plaintiff's propensity for
28 confusion during his job history: "the claimant testified that he became confused while

1 working as a stocker, but there is no evidence of any mental impairment that would cause
2 confusion." (Tr. at 23).

3 Our careful review of the administrative record similarly reveals no evidence of brain
4 damage or other severe neurological disorder. Plaintiff asserts in his Motion that an
5 "appropriate specialist" used relevant tests to assess Plaintiff for "organic limits in memory,
6 speech, and sustaining mental effort." *See* Plaintiff's Motion for Summary Judgement at
7 8:11-14. Plaintiff does not mention, however, who exactly this specialist was, and our review
8 of the medical evidence has revealed no "appropriate" medical specialist, such as a
9 neurologist, who would be competent to make an assessment about organic brain damage.
10 The testing that was used to assess Plaintiff for problems with auditory processing, which
11 included testing for memory and concentration, was done primarily by a school psychologist,
12 Mr. Dennis Watanabe, and by a speech-language pathologist, Ms. Ross-Swain, neither of
13 whom have medical degrees.

14 Accordingly, because there is no evidence, let alone substantial evidence, in the record
15 to support a claim for organic brain damage or other neurological disorder, there was no
16 reason for the ALJ to have evaluated Plaintiff's application for benefits on any such basis.
17 Counsel provides no authority to the contrary, and we cannot find the ALJ's failure to consider
18 whether Plaintiff had a neurological disorder as an appropriate ground to reverse the ALJ's
19 thorough and thoughtful opinion.

20
21 3. *The ALJ Did Not Commit Legal Error By Questioning the Credibility of Some*
22 *of Plaintiff's Statements About His Functional Capacity*

23 Third, Plaintiff seeks review of the ALJ's conclusion that "[t]o the extent that
24 Claimant's statements constitute an assertion that his functional capacity is more restricted
25 than found herein, they cannot be found to be fully credible." (Tr. at 23). Plaintiff also
26 complains that the ALJ incorrectly noted that Plaintiff's grandmother's statements were not
27 "necessarily consistent with disability." (Tr. at 23). As with Plaintiff's other arguments, we
28 cannot conclude that the ALJ committed reversible legal error by making these statements.

1 In general, and within certain boundaries, credibility determinations are the province
2 of the ALJ. "It is the ALJ's role to resolve evidentiary conflicts. If there is more than one
3 rational interpretation of the evidence, the ALJ's conclusion must be upheld." *Allen v.*
4 *Secretary of Health and Human Services*, 726 F.2 1470, 1473 (9th Cir. 1984), citing
5 *Richardson v. Perales*, 402 U.S. 389, 399 (1971); *Sample v. Schweiker*, 694 F.2d 639, 642
6 (9th Cir. 1982). Subject to some legal conditions, an ALJ has discretion not to accept a
7 plaintiff's testimony about h subjective condition. To justify discrediting the subjective
8 evidence, however, the ALJ must articulate reasons or facts that are "sufficiently specific to
9 permit the court to conclude that the ALJ did not arbitrarily discredit claimant's testimony."
10 *See Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002).

11 The ALJ may consider at least the following factors when weighing the claimant's
12 credibility: reputation for truthfulness; inconsistencies either in the claimant's testimony or
13 between testimony and conduct; daily activities; work record; and evidence from physicians
14 and non-parties concerning the nature, severity, and effect of the symptoms of which the
15 claimant complains. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (1997).

16 Moreover, in determining whether a claimant is disabled, an ALJ must consider lay
17 witness testimony. *See Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.1993). "Lay testimony
18 as to a claimant's symptoms is competent evidence that an ALJ must take into account, unless
19 he or she expressly determines to disregard such testimony and gives reasons germane to each
20 witness for doing so." *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) (internal citations
21 omitted).

22 Here, the ALJ did not discount any specific statement made by Plaintiff and did not
23 discount the credibility of Plaintiff's testimony about his symptoms. To the contrary, the ALJ
24 wrote in his opinion that "claimant has a medically determinable impairment that can
25 reasonably be expected to produce the symptoms about which he complains," and that
26 Plaintiff's complaints were found "essentially credible [but] do not preclude him from
27 performing all substantial activity." (Tr. at 23). That the ALJ also noted that Plaintiff's views
28

1 about his functional capacity were not persuasive to the extent they were inconsistent with the
2 other evidence is not to say that Plaintiff's description of his symptoms was not to be believed.
3 Rather, the ALJ seems only to have been making a statement to support the legal conclusion
4 that the symptoms Plaintiff reported did not amount to a disabling condition.

5 Similarly, with respect to the lay testimony provided by Ellen Stover, Plaintiff's
6 grandmother, the fairest reading of the ALJ's statement is not that Ms. Stover's testimony was
7 not credible but that, even if believed, it did not establish that Plaintiff was disabled. Indeed,
8 there is no dispute that the ALJ *considered* Ms. Stover's testimony because the ALJ noted that
9 Plaintiff's "grandmother's observations as to [Plaintiff's] ability to understand and concentrate
10 also are reasonably interpreted to reflect claimant's significant auditory processing
11 limitations." (Tr. at 23).

12 In sum, after a careful review of the entire administrative record, we conclude that, as
13 a matter of law, the ALJ properly considered Plaintiff's testimony on the whole, and the
14 testimony given by his grandmother, Ms. Ellen Stover.

15 Accordingly, we do not find any legal error requiring reversal, and we affirm in its
16 entirety the ALJ's opinion.

17 CONCLUSION

18 The administrative record shows that the ALJ's reasoning and conclusions about
19 Plaintiff's impairment, RFC, and ability to perform jobs that exist in significant numbers in
20 the national economy do not contain legal errors and are supported by substantial evidence.
21 Accordingly, the court AFFIRMS the decision of the ALJ, GRANTS defendant's cross-
22 motion for summary judgment, and DENIES Plaintiff's request for relief.
23

24
25 IT IS SO ORDERED.

26 Dated: November 6, 2008

27 
28 WAYNE D. BRAZIL
United States Magistrate Judge